

Council on Postsecondary Education  
February 4, 2002

## Western Kentucky University E. A. Diddle Arena Memorandum of Agreement

Action: The staff recommends that the council approve the memorandum of agreement among Western Kentucky University, the Hilltopper Athletic Foundation, Inc., and the City of Bowling Green, Kentucky, to finance the renovation of the E. A. Diddle Arena and related athletic facilities on the WKU campus with \$32,500,000 of general obligation bonds issued by the City of Bowling Green, Kentucky.

Senate Bill 54, sponsored by Senators Brett Guthrie and Richie Sanders, was introduced in the 2002 regular session of the General Assembly to "fast track" the E. A. Diddle Arena renovation project authorization so WKU can begin the project immediately. Section 1 (1) of SB 54 requires that the council review and approve the memorandum of agreement (see Attachment) among WKU, the Hilltopper Athletic Foundation, Inc., and the City of Bowling Green, Kentucky.

The committee of the council charged to review proposals to renovate Diddle Arena has reviewed SB 54. SB 54 passed out of the Senate Committee on Appropriations and Revenue January 15, 2002.

At the request of the Capital Projects and Bond Oversight Committee, the council staff, the secretary of the Finance and Administration Cabinet, the Attorney General, and the Auditor of Public Accounts reviewed the WKU memorandum of agreement. All parties reported to the Capital Projects and Bond Oversight Committee that the agreement is acceptable.

Following council action, the staff will forward the council's recommendation to the secretary of the Finance and Administration Cabinet and to the Capital Projects and Bond Oversight Committee.

Staff preparation by Sherron Jackson

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**MEMORANDUM OF AGREEMENT**

This **MEMORANDUM OF AGREEMENT** ("Agreement") is entered into on the \_\_\_\_ day of \_\_\_\_\_, 2001, by and among **WESTERN KENTUCKY UNIVERSITY** ("WKU"), acting by and through its Board of Regents; the **CITY OF BOWLING GREEN, KENTUCKY** (the "City"), acting by and through its Board of Commissioners; and **THE HILLTOPPER ATHLETIC FOUNDATION, INC.**, a Kentucky non-stock non-profit corporation ("HAF"), acting by and through its Board of Directors.

**WITNESSETH:**

**WHEREAS**, the City, Warren County and HAF jointly participated in funding a feasibility study concerning a multi-purpose athletic, recreational and entertainment facility available to the citizens and residents of Bowling Green and Warren County; and

**WHEREAS**, as a result of the feasibility study, it was determined that the construction of a new multi-purpose facility was not feasible, but renovating E.A. Diddle Arena as a multi-purpose athletic, recreational and entertainment facility available to the community is feasible; and

**WHEREAS**, renovating E.A. Diddle Arena as a multi-purpose athletic, recreational and entertainment facility with improved access and adequate parking will promote recreational, economic and cultural opportunities for the citizens and residents of Bowling Green and Warren County; and

**WHEREAS**, WKU owns certain real property within the City described in Exhibit A, on which real property are located certain athletic facilities of WKU, including E. A. Diddle Arena and related athletic facilities (the "Property"); and

**WHEREAS**, certain of the athletic facilities located on the Property, including, but not limited to E.A. Diddle Arena, are in need of renovation and repair in order to be used as multi-purpose athletic, recreational and entertainment facilities, and WKU is without the necessary authority to incur debt for the purpose of renovating and repairing its properties as described within this Agreement; and

**WHEREAS**, the City has agreed, in its sole and absolute discretion, and subject to the provisions of this Memorandum of Agreement, and upon the authorization of the Project by the Kentucky General Assembly, the Kentucky Finance and Administration Cabinet (FAC) and other appropriate State agencies, to issue its General Obligation Bonds, Series 2002A and Series 2002B (the "Bonds"), in an amount up to Thirty-two Million, Five Hundred Thousand Dollars (\$32,500,000.00) to finance the renovation, improvement and equipping of certain facilities identified and described by WKU that are located on the Property consisting of: (1) the renovation of E.A. Diddle Arena; (2) land acquisition, parking lot preparation and pedway design and construction for E.A. Diddle Arena parking; (3) replacement of natural grass with synthetic grass surface for Feix Field and construction of a practice football field; and (4) other additional expenses to include curbing, sidewalks, steps, drainage and other modifications, all related to the foregoing (collectively the "Project"); and

**WHEREAS**, prior to any construction work on the Project, including Diddle Arena, WKU will seek authorization for the Project under KRS 45.760 and authorization for the use of Student Athletic Fees, as defined in this Memorandum of Agreement, from the Kentucky General Assembly during its 2002 Regular Session; and

**WHEREAS**, WKU is prohibited by the Kentucky Revised Statutes from incurring debt for the renovation and improvement of the Project without authorization from the Kentucky General Assembly and other State agencies as provided above; and

**WHEREAS**, HAF is a non-stock, non-profit corporation under KRS Chapter 273 and is a nonaffiliated corporation within the meaning of KRS 164A.550(3), and its purposes among others, are (1) to function as a supporting organization of WKU and its athletic programs with the source of its funds being charitable contributions from individuals and corporations, (2) to solicit tenants for suites to be constructed in the renovated E.A. Diddle Arena, and (3) to sell the naming rights to the renovated E.A. Diddle Arena; and

**WHEREAS**, the Property, including the Project, shall constitute a public project of the City, acting jointly with WKU, within the meaning of KRS Chapter 58 and KRS 66.011 and shall be operated for the educational, athletic, entertainment and recreational activities and purposes of the students, faculty and staff of WKU and the general public as contemplated by the provisions of this Agreement; and

**WHEREAS**, the proposed issuance of the Bonds and the carrying out of the Project shall be subject to the terms and provisions of this Agreement and such subsequent agreements as the parties shall enter into.

**NOW, THEREFORE**, for and in consideration of the mutual covenants contained herein and the mutual benefits to be derived by the parties hereto, the legal sufficiency of which being acknowledged by WKU, HAF and City, it is agreed as follows:

1. **Property.** This Memorandum of Agreement shall apply to all construction and improvements on the Property comprising the Project that are to be funded by the Bonds. The Property and the Project are described in Exhibit A which is incorporated herein by reference.

**2. Project Renovations.** The Project shall consist of the renovation, improvement and equipping of certain facilities identified and described by WKU that are located on the Property consisting of: (1) renovation of E.A. Diddle Arena; (2) land acquisition, parking lot preparation and pedway design and construction for E.A. Diddle Arena; (3) replacement of natural grass with synthetic grass surface for Feix Field and the construction of a practice football; and (4) other additional improvements to include curbing, sidewalks, steps, drainage and other modifications, all related to the foregoing.

**3. Finance and Administration Cabinet.** The parties acknowledge that FAC is authorized to delegate to WKU all or any portion of the Project administration. Subsequent to General Assembly authorization, FAC will approve this Agreement and authorize the Project by a letter to the parties and will specify in that letter which portions of the Project administration will be delegated to WKU. WKU will keep FAC and the Council on Postsecondary Education (CPE) fully informed of the Project and will provide information, including, but not limited to, a Project update at completion of design, construction status reports once construction is underway, and copies of all construction project meeting minutes.

**4. General Assembly Authorization.** WKU will seek authorization under KRS 45.760 and any other relevant statutes for the Project from the General Assembly early in its 2002 session as contemplated by this Memorandum of Agreement and authorization for the use of Student Athletic Fees as contemplated by this Memorandum of Agreement. "Student Athletic Fees" shall consist of those fees assessed and collected from WKU students and dedicated to WKU athletics, including the costs of this Project.

**5. Closing And Sale Of Bonds and Project Administration.** After State authorizations of the Project and court approval, if sought as set out in Paragraph 22, and satisfaction of all

legal and credit requirements of the City, the City shall cause to be issued up to Thirty- two Million, Five Hundred Thousand Dollars (\$32,500,000.00) of the Bonds, amortized over a term to be determined by the City, with the advice of WKU. The Bond proceeds shall be utilized for the payment of costs of renovations and improvements related to the Project, including but not limited to qualifying surveying fees, architectural fees, engineering, contractors' costs, design costs, replacement of fixtures, furniture and equipment and reasonable legal fees and cost of issuance. WKU shall serve as the contracting entity for the Project and shall undertake the Project consistent with the plans and specifications submitted to and approved by City. The City shall have no liability for any costs that exceed the funds available from the Bonds. All renovations and improvements made under the provisions of this Memorandum of Agreement shall be made under the supervision of a construction manager and shall comply with all applicable federal, state and local laws and regulations. The City shall have the right to make inspections of the Project at reasonable times during construction. All invoices for payment shall be reviewed and approved by the construction manager and WKU and shall be forwarded to City's department head for the Department of Public Works. Upon City's approval, City shall direct that the appropriate amount of Bond proceeds be paid to WKU and WKU shall be responsible for payment to the various contractors.

**6. Covenant to Impose and to Transfer Funds to City.** After authorization for the construction and the use of Student Athletic Fees is granted by the Kentucky General Assembly and other State agencies and officials as may be required, the Board of Regents of WKU agrees and covenants to impose throughout the term of the Bond issue the Student Athletic Fees in amounts not less than the principal of and interest on the Bonds and associated administrative costs and expenses incurred by the City and to appropriate and to pay to the City the Student

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Athletic Fees it collects, and HAF covenants and agrees to pay to the City all net revenue it receives from the rentals of suites (defined as annual suite rental minus annual HAF contribution) and all revenue it receives from the naming rights to the newly renovated E.A. Diddle Arena throughout the entire term of the Bond issue (all such payments being referred to collectively as the "Project Payments"). All payments to the City of the Student Athletic Fees shall be made on a schedule determined by the City in its sole discretion. Any of the Student Athletic Fees that are determined by the City, in its sole discretion, not to be needed by the City in any year of the Project shall be returned to WKU. All payments to the City of the suite rental and naming rights revenues shall be made on a schedule agreed to by the City and HAF. None of the indebtedness can be assigned or transferred, directly or indirectly, to the Commonwealth of Kentucky.

**7. Model Procurement Code.** WKU shall adhere to the applicable provisions of the Kentucky Model Procurement Code on the Project.

**8. Prevailing Wage.** All services performed on the Project shall be subject to the applicable provisions of the Kentucky prevailing wage law, KRS 337.505 through 337.550.

**9. Commitment for Revenue.** WKU covenants and agrees to maintain the Student Athletic Fees in amounts not less than the principal of and interest on the Bonds and associated administrative costs and expenses and such other amounts as may be required by the City as contemplated by this Memorandum of Agreement throughout the term of the Bond issue.

**10. Records.** Upon written request, City, HAF and WKU shall provide to each other or to any competent authority of the Commonwealth of Kentucky, including without limitation, the Finance and Administration Cabinet, the Council on Postsecondary Education, the Legislative

Research Commission, or Auditor of Public Accounts, access to any financial or operating records maintained by or on behalf of the City, HAF or WKU relating to the Property.

**11. Repairs, Maintenance and Replacements.** The Property shall be repaired, maintained or replaced by WKU at its sole expense in the following manner:

**A. Maintenance.** WKU shall maintain the Property in good repair and condition and in conformity with all federal, state and local requirements and shall make or cause to be made routine repairs and maintenance.

**B. Repairs.** WKU shall use its best efforts to cause the Property to be maintained in good repair, including but not limited to, cleaning, painting, decorating, plumbing, carpentry, heating, ventilation, air-conditioning, grounds care, and such other maintenance and repair work as may be necessary.

**12. Indemnification.** WKU shall indemnify and hold harmless the City and HAF from any liability, including attorneys' fees and court costs, resulting from any claims, actions or suits related to claims for damages in or related to Diddle Arena or any of the other Project locations or activities. WKU shall require all third party vendors operating on the Property to carry liability insurance with coverage limits as designated by WKU, and to provide WKU with proof of such insurance.

**13. Property Insurance.** WKU shall purchase and maintain, at its sole expense, property insurance coverage, including but not limited to coverage for fire, lightning, windstorm, hail, earthquake, explosion, riot, riot attending a strike, civil commotion, damage from aircraft, smoke and uniform standard coverage and vandalism and malicious mischief endorsements and business interruption insurance coverage and contents thereof for full replacement value of Diddle Arena. Such policy or policies of insurance may be obtained through the State Risk and



Insurance Services of the Department of Insurance for real estate and properties owned by the Commonwealth of Kentucky. WKU shall act in a prompt manner in connection with the making of any claims and the collection of any insurance money that may be due and shall execute and deliver such proofs of loss and other instruments that may be required for the purpose of obtaining the recovery of any such insurance monies. Any funds collected from insurance coverage shall be used to make repairs to the Property and, if not used to make repairs, any funds collected shall be applied towards the Bond debt. Should WKU fail to maintain the insurance coverage required above, the City may, at its discretion, purchase and maintain the required insurance and the cost of such insurance shall be considered part of the next Project Payment.

**14. Facilities Usage Policies.** WKU shall establish policies relating to the use of the Property, including, but not limited to, policies relating to public access, drugs, smoking, weapons, public availability to the property and related policies. All such policies shall comply in all respects with all applicable laws and regulations and shall be subject to notification of the City. If the City takes no action to disapprove any such policy within 20 days of receiving notice, then such policy will be deemed approved by the City.

**15. Remedies.** Each party to this Memorandum of Agreement may, in that party's sole discretion, proceed to exercise or enforce any right, power, privilege, remedy or interest that such party may have under this Memorandum of Agreement or applicable law without notice, except as otherwise expressly provided herein, without pursuing, exhausting or otherwise exercising or enforcing any other right, power, privilege, remedy or interest that such party may have against or in respect of any other party or any other person or entity, and without regard to any act or omission of such party, person or other entity.

**16. Compliance with Applicable Laws and Regulations.** WKU covenants and agrees that it and its agents and employees, will comply with all municipal, county, state, and federal laws, rules, regulations and ordinances applicable to the Property or the work to be performed under this Memorandum of Agreement and it shall obtain all necessary permits and shall pay all respective applicable license fees and taxes.

**17. Other Party Rights.** No entity or person other than a party hereto other than bondholders and any credit enhancers will have any right, remedy or claim under or by reason of this Agreement or otherwise be an outside party beneficiary of any rights, remedies, claims or agreements hereunder. WKU, the City and HAF acknowledge and agree this Memorandum of Agreement may be used in any manner by the City in any issuance of the Bonds.

**18. Exhibit Incorporated by Reference.** Exhibit A referred to in this Memorandum of Agreement shall be considered incorporated into this Memorandum of Agreement as if copied in full.

**19. Binding Effect.** This Memorandum of Agreement shall be binding upon, and shall inure to the benefit of, the respective successors and assigns of the parties hereto.

**20. Entire Agreement and Amendments.** Other than documents related to the Bonds and other transactions contemplated herein, this Memorandum of Agreement contains the entire understanding of the parties hereto with respect to the subject matter contained herein and may be amended, supplemented or superseded by the parties.

**21. Governing Law.** This Agreement shall be construed in accordance with, and governed by, the laws of the Commonwealth of Kentucky.

**22. Authority.** City represents and warrants it is a duly organized city and political subdivision of the Commonwealth of Kentucky. WKU represents and warrants it is a duly

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organized state-chartered university and political subdivision of the Commonwealth of Kentucky. HAF represents and warrants that it is a nonprofit corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Kentucky. Each party to this Memorandum of Agreement has full power and authority to enter into this Memorandum of Agreement and to carry out its obligations hereunder. Each party has previously adopted municipal orders or resolutions authorizing this Memorandum of Agreement. Each party acknowledges that the execution and delivery of this Memorandum of Agreement does not conflict with or result in the breach of the terms of any agreement or instrument by which the party is bound, or conflicts with or results in the violation of any provision of law or regulation applicable to the party. Each party acknowledges that there is no litigation or proceeding pending or threatened against the party or any other person or entity affecting the right of such party to execute or deliver this Memorandum of Agreement or to comply with its obligations under this Memorandum of Agreement. Due to the unique nature of this transaction, the City reserves the right pursuant to the Kentucky Revised Statutes to seek a declaratory action in Warren Circuit Court to obtain court approval of the Bonds and the transactions and commitments set out in this Memorandum of Agreement, and the parties agree, notwithstanding any other provisions of this Memorandum of Agreement, that the performance and enforcement of this Memorandum of Agreement shall be subject to such court approval, if sought by the City, as well as the authorization of the General Assembly, the Kentucky Finance and Administration Cabinet and other State agencies as may be required.

**23. Headings.** The headings of the sections of this Memorandum of Agreement are inserted solely for convenience of reference and are not part of and are not intended to govern, limit or aid in the construction of any term or provision hereof.

**24. Modifications.** Each and every modification to or amendment to this Agreement must be in writing and signed by the parties hereto, or their respective successors and assigns. Each and every waiver of and consent to any departure from and term or provision hereof (except as otherwise provided herein) must be in writing and signed by the party against whom enforcement of the waiver or consent is sought.

**25. Counterparts.** This Memorandum of Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

**26. Time is of the Essence.** Time is of the essence with respect to the obligations of the parties hereto, subject to the reasonable and prudent actions and determinations of the parties.

**27. No Presumption.** Since each party and its counsel have reviewed and negotiated the terms and provisions of this Memorandum of Agreement and have contributed to the drafting of this Memorandum of Agreement, the rule of construction to the effect that any ambiguities are resolved against the drafting party will not be employed in the interpretation of this Memorandum of Agreement. Its terms and provisions will be construed fairly as to all parties hereto and not in favor of or against any party, regardless of which party was generally responsible for the preparation of this Memorandum of Agreement.

**28. Application of Agreement.** This Agreement shall be effective upon execution by the parties and authorization by the Kentucky General Assembly and other necessary State agencies. The terms of this Memorandum of Agreement shall be applicable for so long as the Bonds shall be outstanding.

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**29. Notices.** All notices, requests, consents, and other communications under this Memorandum of Agreement shall be in writing and shall be mailed first class, registered or certified mail, postage prepaid, return receipt requested:

If to WKU:

Dr. Gary A. Ransdell, President  
Western Kentucky University  
One Big Red Way  
Bowling Green, KY 42101

With Copies to:

Deborah Wilkins  
General Counsel  
Western Kentucky University  
One Big Red Way  
Bowling Green, KY 42101

Kevin Flanery, Secretary  
Finance and Administration Cabinet  
383 Capitol Annex  
Frankfort, Kentucky 40601

If to City:

Charles Coates, City Manager  
City Hall  
1001 College Street  
Bowling Green, KY 42101

With Copy to:

H. Eugene Harmon  
Satterfield & Harmon  
P. O. Box 9970, 313 East 10<sup>th</sup> Avenue  
Bowling Green, KY 42102-4970

If to HAF:

Jim Clark  
Hilltopper Athletic Foundation  
Western Kentucky University  
E.A. Diddle Arena, Room 211

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Bowling Green, KY 42101

With Copy to:

Keith M. Carwell  
English, Lucas, Priest & Owsley  
P.O. Box 770  
1101 College Street  
Bowling Green, KY 42102-0770

or to such other address of which the addressee shall have notified the sender in writing. Said notice or other communication shall be considered received on the date on which it is actually delivered to the Property of the addressee, such date to be conclusively evidenced by the date of the return receipt.

**IN WITNESS WHEREOF**, the parties hereto have caused this Memorandum of Agreement to be executed by their duly authorized representatives on the date set forth opposite their signatures below.

**WESTERN KENTUCKY UNIVERSITY**

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

**THE HILLTOPPER ATHLETIC  
FOUNDATION, INC.**

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

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**CITY OF BOWLING GREEN, KENTUCKY**

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

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COMMONWEALTH OF KENTUCKY )  
 ) SS  
COUNTY OF WARREN )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2001, by \_\_\_\_\_, as \_\_\_\_\_ of Western Kentucky University, a state university created by and operating under the laws of the Commonwealth of Kentucky, on behalf of its Board of Regents.

**My commission expires:** \_\_\_\_\_

**NOTARY PUBLIC**

COMMONWEALTH OF KENTUCKY )  
 ) SS  
COUNTY OF WARREN )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2001, by \_\_\_\_\_, as \_\_\_\_\_ the duly authorized representative and constituted authority of The Hilltopper Athletic Foundation, Inc., on behalf of its board of directors.

My commission expires: \_\_\_\_\_

**NOTARY PUBLIC**



COMMONWEALTH OF KENTUCKY           )  
  ) SS  
COUNTY OF WARREN                     )

My commission expires: \_\_\_\_\_

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